

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KENTRELL D. WELCH,

Plaintiff,

Case No. 3:23-cv-00224-ART-CLB

v.

JAMES DZURENDA, et al.,

Defendants.

ORDER

Plaintiff, who is incarcerated in the custody of the Nevada Department of Corrections (“NDOC”), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983, and has filed an application to proceed *in forma pauperis*. (ECF Nos. 1, 1-1). The matter of the filing fee will be temporarily deferred. The Court now screens Plaintiff’s civil rights complaint under 28 U.S.C. § 1915A.

I. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged violation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

In addition to the screening requirements under § 1915A, pursuant to the

1 Prison Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's
 2 claim, if "the allegation of poverty is untrue," or if the action "is frivolous or
 3 malicious, fails to state a claim on which relief may be granted, or seeks monetary
 4 relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2).
 5 Dismissal of a complaint for failure to state a claim upon which relief can be
 6 granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court
 7 applies the same standard under § 1915 when reviewing the adequacy of a
 8 complaint or an amended complaint. When a court dismisses a complaint under
 9 § 1915(e), the plaintiff should be given leave to amend the complaint with
 10 directions as to curing its deficiencies, unless it is clear from the face of the
 11 complaint that the deficiencies could not be cured by amendment. *See Cato v.*
 12 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

13 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See*
 14 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal
 15 for failure to state a claim is proper only if it is clear that the plaintiff cannot
 16 prove any set of facts in support of the claim that would entitle him or her to
 17 relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this
 18 determination, the court takes as true all allegations of material fact stated in the
 19 complaint, and the court construes them in the light most favorable to the
 20 plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996).
 21 Allegations of a *pro se* complainant are held to less stringent standards than
 22 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980).
 23 While the standard under Rule 12(b)(6) does not require detailed factual
 24 allegations, a plaintiff must provide more than mere labels and conclusions. *Bell*
 25 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the
 26 elements of a cause of action is insufficient. *Id.*

27 Additionally, a reviewing court should "begin by identifying pleadings
 28 [allegations] that, because they are no more than mere conclusions, are not

1 entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).
 2 “While legal conclusions can provide the framework of a complaint, they must be
 3 supported with factual allegations.” *Id.* “When there are well-pleaded factual
 4 allegations, a court should assume their veracity and then determine whether
 5 they plausibly give rise to an entitlement to relief.” *Id.* “Determining whether a
 6 complaint states a plausible claim for relief . . . [is] a context-specific task that
 7 requires the reviewing court to draw on its judicial experience and common
 8 sense.” *Id.*

9 Finally, all or part of a complaint filed by a prisoner may therefore be
 10 dismissed *sua sponte* if the prisoner’s claims lack an arguable basis either in law
 11 or in fact. This includes claims based on legal conclusions that are untenable
 12 (e.g., claims against defendants who are immune from suit or claims of
 13 infringement of a legal interest which clearly does not exist), as well as claims
 14 based on fanciful factual allegations (e.g., fantastic or delusional scenarios). See
 15 *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989); *see also McKeever v. Block*, 932
 16 F.2d 795, 798 (9th Cir. 1991).

17 **II. SCREENING OF COMPLAINT**

18 In his Complaint, Plaintiff sues multiple Defendants for events that took
 19 place while Plaintiff was incarcerated at Ely State Prison (“ESP”). ECF No. 1-1 at
 20 1. Plaintiff sues Defendants James Dzurenda, Patricia Hernandez, James
 21 Underwood, Tasheena Cooke, and William Gittere. *Id.* at 2. Plaintiff brings one
 22 claim and seeks monetary, punitive, and injunctive relief. *Id.* at 3, 13.

23 Plaintiff alleges the following. On June 2, 2020, during intake in Unit 7B,
 24 Underwood loudly exposed Plaintiff’s protective custody status on tier. *Id.* at 3.
 25 Underwood threatened to send Plaintiff to general population without
 26 classification review. *Id.* On June 18, 2020, Plaintiff was moved to the protective
 27 segregation unit (“PSU”) and was placed in a double cell with C. Gilbert, until
 28 Gilbert was removed in August 2020. *Id.* at 3-4.

1 On September 29, 2020, “eses, NV 13, and Sureno 13 dropouts”¹
 2 approached Plaintiff and insinuated that Correction Officers (“C/Os”) Amber
 3 Bodenhamier, Esquivel, and Clay told them that Plaintiff was snitching on them.
 4 *Id.* at 4. They told Plaintiff that if he did not leave, then Plaintiff would be gravely
 5 injured, attacked, or killed. *Id.* at 5. Between August and October 2020, C/Os
 6 Esquivel, Bodenhamier, and Clay spread “vile rumors” to cause Plaintiff grave
 7 harm or injury. *Id.* at 4. He alleges that they spread these rumors in retaliation
 8 to Plaintiff filing grievances against them. *Id.* Bodenhamier and Esquivel refused
 9 to collect Document 1564 or provide Document 3012 kites. *Id.* at 5.

10 On October 22, 2020, Esquivel attempted to force Plaintiff to double cell
 11 with a blood gang member after threats were made to Plaintiff. *Id.* Allred told
 12 Plaintiff if he did not agree to be in a double cell, then Plaintiff would receive a
 13 disciplinary write-up. *Id.* Plaintiff requested an open cell for disabled inmates to
 14 resolve the issue and because Plaintiff is disabled. *Id.* Allred denied Plaintiff’s
 15 request and issued the disciplinary write-up. *Id.*

16 Bodenhamier, Esquivel, and Clay heard inmates yell over the tier all night
 17 that “niggers and snitches” will die in the morning. *Id.* at 6. On October 17, 2020,
 18 Plaintiff witnessed inmates attack and stab an African American inmate, Webb.
 19 *Id.* at 6. Plaintiff was told that he was next. *Id.* However, no C/Os intervened. *Id.*
 20 Plaintiff remained in his cell and refused to exit. *Id.* On October 18, 2020, while
 21 he was housed in Unit 4A, inmates verbally threatened that Plaintiff would be
 22 killed. *Id.* Ray Rivera refused to remove Plaintiff from the unit despite Plaintiff
 23 submitting kites and grievances. *Id.*

24 On December 4, 2020, Plaintiff was moved to Unit 4b after Dugan took
 25 Plaintiff’s report. *Id.* at 7. On September 8, 2021, Cooke ordered that Plaintiff
 26 would be moved back to Unit 2B even though Plaintiff received threats to his
 27

28 ¹ NV 13 and Sureno 13 are gangs and are referred to as security threat groups.

1 safety. *Id.* On September 9, 2021, C/Os Clay, Kleer, and Rowley told Plaintiff that
 2 they were going to enjoy “beating [his] retarded ass and destroying all [his] shit.”
 3 *Id.* Curtis Rigdney told Plaintiff that he had to go to the unit, or they were going
 4 to gas Plaintiff and use excessive force. *Id.*

5 Plaintiff complied and moved back to Unit 2B. *Id.* Upon entering the unit,
 6 Underwood, Dugan, and Hernandez heard loud threats that Plaintiff would be
 7 killed or injured over the tier. *Id.* at 8. In September 2021, Dugan heard threats
 8 to Plaintiff. *Id.* Underwood and Cox witnessed two inmates rush to Plaintiff’s cell
 9 threatening to kill or sodomize him. *Id.*

10 Plaintiff was forced to move to Unit 8A. *Id.* at 9. He alleges that if he refused
 11 to move, he would have been hit with gas and excessive force. *Id.* On October 11,
 12 2021, Underwood heard multiple threats directed at Plaintiff and that Plaintiff
 13 was called a rat and snitch. *Id.* On October 28, 2021, Hollisworth heard threats
 14 to Plaintiff and that Plaintiff was called a rat and snitch upon re-entry to the unit.
 15 *Id.* In October 2021, Hinckle and Dancer witnessed “NV13” loudly threaten to kill
 16 Plaintiff. *Id.* at 10. Despite being aware of these threats, Cooke refused to remove
 17 Plaintiff from the unit. *Id.* at 9.

18 In June 2022, Melina Castro informed Plaintiff that she would not submit
 19 Plaintiff for a transfer to another facility due to PSU issues. *Id.* at 10. Castro told
 20 Plaintiff that he would go back to the PSU, be double-housed, or placed in
 21 administrative segregation indefinitely. *Id.* Plaintiff further alleges that Castro
 22 fabricated his RFS score from 12 to 19 points to stop a transfer. *Id.* Castro told
 23 Plaintiff that he burned his bridges with NDOC supervisors, because of his civil
 24 litigation. *Id.*

25 Patricia Hernandez also told Plaintiff that he would be indefinitely placed
 26 in administrative segregation if he did not return to the PSU. *Id.* at 11. Hernandez
 27 also confirmed that NDOC supervisors were disgruntled with Plaintiff because of
 28 his civil litigation and that Plaintiff could not be transferred from ESP. *Id.* On May

1 26, 2023, during administrative segregation review, Underwood told Plaintiff that
2 he was sent there due to Plaintiff's civil litigation and grievances. *Id.*

3 Plaintiff alleges that he is entering three years of indefinite administrative
4 segregation. *Id.* at 12. As a result, he suffers from psychological, emotional and
5 physical injuries, such as muscle atrophy. *Id.* The Court interprets Plaintiff's
6 allegations as stating that C/Os have labeled him as a snitch, that he is being
7 threatened by other inmates who are in security threat groups, and that he has
8 been placed in administrative segregation indefinitely.

9 Based on the allegations, the Court construes Plaintiff's complaint to allege
10 the following claims based on different theories of liability:

- 11 • Violation of Fourteenth Amendment procedural due process—
12 administrative segregation;
- 13 • Eighth Amendment deliberate indifference—failure to protect;
- 14 • First Amendment retaliation;
- 15 • Fourteenth Amendment—administrative grievance process;
- 16 • Claim under 28 U.S.C. § 1746;
- 17 • State law claims under NRS 208.165 and various subsections of NRS
18 209;
- 19 • Violation of Administrative Regulation (“AR”) claims; and
- 20 • Fourteenth Amendment—violation of state law.

21 **A. Procedural Due Process—Administrative Segregation**

22 Under the Fourteenth Amendment, prisoners “may not be deprived of life,
23 liberty, or property without due process of law.” *Wolff v. McDonnell*, 418 U.S. 539,
24 556 (1974). However, “the fact that prisoners retain rights under the Due Process
25 Clause in no way implies that these rights are not subject to restrictions imposed
26 by the nature of the regime to which they have been lawfully committed.” *Id.*
27 “[T]here must be mutual accommodation between institutional needs and
28 objectives and the provisions of the Constitution that are of general application.”

1 *Id.* The Supreme Court held that a prisoner possesses a liberty interest under the
2 federal constitution when a change occurs in confinement that “imposes atypical
3 and significant hardship on the inmate in relation to the ordinary incidents of
4 prison life.” *See Sandin v. Conner*, 515 U.S. 472, 484 (1995).

5 When a prisoner is placed in administrative segregation, prison officials
6 must, within a reasonable time after the prisoner’s placement, conduct an
7 informal, non-adversary review of the evidence justifying the decision to segregate
8 the prisoner. *See Hewitt v. Helms*, 459 U.S. 460, 476 (1983), *abrogated in part on*
9 *other grounds by Sandin v. Connor*, 515 U.S. 472 (1995). After the prisoner has
10 been placed in administrative segregation, prison officials must periodically
11 review the initial placement. *See Hewitt*, 459 U.S. at 477 n.9. An inmate has the
12 right to notice and the right to be heard. *Mendoza v. Blodgett*, 960 F.2d 1425,
13 1430 (9th Cir. 1992). The Ninth Circuit has held that where the prisoner alleges
14 material differences between the conditions in general population and
15 administrative segregation, the prisoner’s procedural due process claim should
16 not be dismissed on the pleadings. *See Jackson v. Carey*, 353 F.3d 750, 755-57
17 (9th Cir. 2003).

18 Plaintiff fails to state a colorable procedural due process claim. He alleges
19 that Defendants placed him in “indefinite” administrative segregation and has
20 been in administrative segregation for three years. He alleges that he suffers
21 significant, atypical hardship because isolation creates psychological and
22 emotional harm as well as physical injuries, like muscle atrophy. Plaintiff,
23 however, has not alleged when or if he was informed about the reasons for placing
24 him in administrative segregation, whether Plaintiff had the opportunity to
25 respond to those reasons, and whether prison officials have periodically reviewed
26 Plaintiff’s administrative segregation placement. Therefore, this claim is
27 dismissed without prejudice. Plaintiff may, if he so chooses, file an amended
28 complaint stating additional true facts that adequately allege a liberty interest,

1 such as the imposition of atypical conditions of confinement, and that Plaintiff
 2 was denied a hearing or review of his placement in administrative segregation.

3 **B. Eighth Amendment Deliberate Indifference—Failure to Protect**

4 Under the Eighth Amendment, prison officials have a duty to protect
 5 prisoners from violence at the hands of other prisoners. *Farmer v. Brennan*, 511
 6 U.S. 825, 833 (1994). To establish a violation of this duty, the prisoner must
 7 establish that prison officials were deliberately indifferent to serious threats to
 8 the inmate’s safety. *Id.* at 834. To demonstrate that a prison official was
 9 deliberately indifferent to a serious threat to the inmate’s safety, the prisoner
 10 must show that “the official [knew] of and disregard[ed] an excessive risk to
 11 inmate . . . safety; the official must both be aware of facts from which the
 12 inference could be drawn that a substantial risk of serious harm exists, and [the
 13 official] must also draw the inference.” *Id.* at 837. Prison officials may not escape
 14 liability because they cannot, or did not, identify the specific source of the risk;
 15 the serious threat can be one to which all prisoners are exposed. *Id.* at 843.

16 A prisoner seeking a remedy for unsafe conditions does not have to await
 17 a tragic event such as an actual assault before obtaining relief. *Id.* at 845. “An
 18 inmate seeking an injunction on the ground that there is a contemporary
 19 violation of a nature likely to continue must adequately plead such a violation.”
 20 *Id.* at 845-46 (quotations and citation omitted). Plaintiff must plead that prison
 21 officials are “knowingly and unreasonably disregarding an objectively intolerable
 22 risk of harm, and that they will continue to do so.” *Id.* at 846.

23 The Court finds that Plaintiff states a colorable Eighth Amendment
 24 deliberate indifference failure to protect claim against Underwood and Cooke.
 25 Based on the allegations, Underwood exposed Plaintiff’s protective custody
 26 status, threatened to send Plaintiff to general population, witnessed multiple
 27 threats directed at Plaintiff, and refused to transfer Plaintiff to another unit.
 28 Cooke refused to move Plaintiff to another unit despite being aware of threats to

1 his safety.

2 In addition, Plaintiff alleges that Bodenhamier, Esquivel, and Clay told
3 other inmates that Plaintiff was a snitch to provoke violence against Plaintiff
4 because Plaintiff filed grievances against them. *See Valandingham v. Bojorquez*,
5 866 F.2d 1135, 1138 (9th Cir. 1989) (finding Plaintiff could state a claim for
6 violations of the Eighth and First Amendments based on his allegation that
7 officials labeled him a snitch in retaliation for filing a grievance, intentionally
8 subjecting Plaintiff to the threat of physical harm by other inmates as a result).
9 The Court construes the allegations against Bodenhamier, Esquivel, and Clay as
10 identifying them as defendants even though Plaintiff does not list them in the
11 caption of his complaint and finds that Plaintiff states a colorable Eighth
12 Amendment failure to protect claim against them.

13 The Court also finds that Plaintiff fails to allege sufficient facts to state a
14 colorable claim against Dzurenda, Hernandez, and Gittere. A defendant is liable
15 under 42 U.S.C. § 1983 “only upon a showing of personal participation by the
16 defendant.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). “A supervisor is
17 only liable for constitutional violations of his subordinates if the supervisor
18 participated in or directed the violations, or knew of the violations and failed to
19 act to prevent them. There is no respondeat superior liability under [§] 1983.” *Id.*
20 Plaintiff does not allege that Dzurenda, Hernandez, and Gittere personally
21 participated in, directed the violations, or knew of violations by subordinates and
22 failed to act. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (holding that
23 “[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff
24 must plead that each Government-official defendant, through the official’s own
25 individual actions, has violated the Constitution”). Therefore, this claim is
26 dismissed without prejudice against Dzurenda, Hernandez, and Gittere. Plaintiff
27 may, if he so chooses, file an amended complaint stating additional true facts
28 that allow the Court to infer that Dzurenda, Hernandez, and Gittere knew about

1 the treats to Plaintiff but failed to act to remedy such.

2 **C. First Amendment Retaliation**

3 Prisoners have a First Amendment right to file prison grievances and to
 4 pursue civil rights litigation in the courts. *Rhodes v. Robinson*, 408 F.3d 559, 567
 5 (9th Cir. 2005). “Without those bedrock constitutional guarantees, inmates would
 6 be left with no viable mechanism to remedy prison injustices. And because purely
 7 retaliatory actions taken against a prisoner for having exercised those rights
 8 necessarily undermine those protections, such actions violate the Constitution
 9 quite apart from any underlying misconduct they are designed to shield.” *Id.*

10 To state a viable First Amendment retaliation claim in the prison context,
 11 a plaintiff must allege: “(1) [a]n assertion that a state actor took some adverse
 12 action against an inmate (2) because of (3) that prisoner’s protected conduct, and
 13 that such action (4) chilled the inmate’s exercise of his First Amendment rights,
 14 and (5) the action did not reasonably advance a legitimate correctional goal.” *Id.*
 15 at 567-68. Total chilling is not required; it is enough if an official’s acts would
 16 chill or silence a person of ordinary firmness from future First Amendment
 17 activities. *Id.* at 568-69. A plaintiff who fails to allege a chilling effect may still
 18 state a claim if he alleges that he suffered some other harm that is more than
 19 minimal. *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012).

20 The Court finds that Plaintiff states a colorable retaliation claim against
 21 Dzurenda, Underwood, Hernandez, Cooke, and Gittere. Based on the allegations,
 22 Plaintiff engaged in protective activity by filing lawsuits against NDOC officials.
 23 He also alleges that he suffered adverse actions when he was placed in
 24 administrative segregation, when Cooke transferred Plaintiff to another unit
 25 despite threats to his safety, and Plaintiff was denied a transfer from ESP because
 26 of his civil litigation.

27 In addition, as stated above, Plaintiff alleges that Bodenhmier, Esquivel,
 28 and Clay told other inmates that Plaintiff was a snitch to provoke violence against

1 Plaintiff because Plaintiff filed grievances against them. *See Valandingham v.*
 2 *Bojorquez*, 866 F.2d 1135, 1138 (9th Cir. 1989). The Court construes the
 3 allegations against Bodenhymer, Esquivel, and Clay as identifying them as
 4 defendants even though Plaintiff did not list them in the caption. This claim will
 5 proceed against Dzurenda, Underwood, Hernandez, Cooke, Gittere,
 6 Bodenhymer, Esquivel, and Clay.

7 **D. Due Process—Administrative Grievance Process**

8 Prisoners have no stand-alone due process rights related to the
 9 administrative grievance process. *See Mann v. Adams*, 855 F.2d 639, 640 (9th
 10 Cir. 1988) (holding that a state's unpublished policy statements establishing a
 11 grievance procedure do not create a constitutionally protected liberty interest);
 12 *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (holding that there is no
 13 liberty interest in the processing of appeals because there is no liberty interest
 14 entitling inmates to a specific grievance process).

15 The Court finds that Plaintiff fails to state a colorable due process claim for
 16 prison officials rejecting his grievances. Based on the law, Plaintiff does not have
 17 a right to have prison officials process an inmate grievance in any specific way.
 18 As such, the Court dismisses this claim with prejudice as amendment would be
 19 futile.

20 **E. 28 U.S.C. § 1746**

21 Plaintiff cites to 28 U.S.C. § 1746, which provides that unsworn
 22 declarations may have the same effect as sworn declarations if the plaintiff
 23 includes the following: "I declare under penalty of perjury that the foregoing is
 24 true and correct. Executed on [date]. [Signature]." ECF No. 1-1 at 3, 8, 9, 11. The
 25 Court finds no discernible claim asserted by Plaintiff under 28 U.S.C. § 1746.
 26 Accordingly, to the extent Plaintiff attempts to state a claim under 28 U.S.C. §
 27 1746, the Court dismisses Plaintiff's claim with prejudice as amendment would
 28 be futile.

1 **F. State Law Claims**

2 Plaintiff cites several provisions of the Nevada Revised Statutes (“NRS”),
 3 including NRS 208.165, NRS 209.131, NRS 209.161, and NRS 209.181. ECF No.
 4 1-1 at 4, 8, 10, 11, 12. NRS 208.165 provides that an inmate may execute any
 5 instrument by signing a declaration, under penalty of perjury, with the same legal
 6 effect as a notarized oath. The subsections of NRS 209 that Plaintiff cites also do
 7 not create a private right of action under which Plaintiff may sue. *See Ross v.*
 8 *Sandoval*, Case No. 2:17-cv-02386-APG-GWF, 2017 WL 6000342, at *12 (D. Nev.
 9 Dec. 4, 2017). Accordingly, to the extent Plaintiff attempts to state a claim under
 10 the NRS, the Court dismisses Plaintiff’s state law claims with prejudice as
 11 amendment would be futile.

12 **G. Administrative Regulation Claims**

13 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two
 14 essential elements: (1) the violation of a right secured by the Constitution or laws
 15 of the United States, and (2) that the alleged violation was committed by a person
 16 acting under color of state law. *See West*, 487 U.S. at 48. NDOC’s administrative
 17 regulations address general administration as well as areas, including health care
 18 services and inmate regulations. The NDOC administrative regulations, however,
 19 do not create any right, liberty, property interest, or establish the basis for any
 20 cause of action. Accordingly, the Court dismisses any constitutional claims
 21 Plaintiff is attempting to raise based on violations of the NDOC’s administrative
 22 regulations with prejudice as amendment would be futile.

23 **H. Due Process—Violation of State Law Only**

24 To state a colorable Fourteenth Amendment Due Process Clause violation,
 25 a plaintiff must establish: (1) a liberty or property interest that he or she has been
 26 deprived of, and (2) that the procedures followed by the State were
 27 constitutionally insufficient. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). The
 28 Supreme Court has held that allegations that a defendant violated state law are

1 insufficient to state a claim for violation of the Fourteenth Amendment's Due
2 Process Clause. *Id.* at 222 (holding that "a 'mere error of state law' is not a denial
3 of due process").

4 To the extent that Plaintiff attempts to state a Fourteenth Amendment due
5 process claim because a defendant violated NDOC administrative regulations,
6 Plaintiff does not and cannot state a colorable due process claim. Accordingly,
7 the Court dismisses this claim with prejudice as amendment would be futile.

8 **III. LEAVE TO AMEND**

9 Although the Court grants Plaintiff leave to amend, it does not grant
10 Plaintiff leave to amend in any way that he sees fit. Plaintiff has leave to amend
11 to allege additional true facts to show a Fourteenth Amendment Procedural Due
12 Process claim—administrative segregation and an Eighth Amendment deliberate
13 indifference failure to protect claim against Defendants Dzurenda, Hernandez,
14 and Gittere. The Court does not give Plaintiff leave to assert new claims.

15 If Plaintiff chooses to file an amended complaint, he is advised that an
16 amended complaint replaces the complaint, so the amended complaint must be
17 complete in itself. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896
18 F.2d 1542, 1546 (9th Cir. 1989) (holding that "[t]he fact that a party was named
19 in the original complaint is irrelevant; an amended pleading supersedes the
20 original"); *see also Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012)
21 (holding that for claims dismissed with prejudice, a plaintiff is not required to
22 reallege such claims in a subsequent amended complaint to preserve them for
23 appeal). This means that the amended complaint must contain all facts and
24 claims and identify all defendants that he intends to sue, including the claims
25 found cognizable in this order. He must file the amended complaint on this
26 Court's approved prisoner-civil-rights form, and it must be entitled "First
27 Amended Complaint." Plaintiff must follow the instructions on the form. He need
28 not and should not allege very many facts in the "nature of the case" section of

1 the form. Rather, in each claim, he should allege facts sufficient to show what
2 each defendant did to violate his civil rights. He must file the amended complaint
3 within 30 days from the date of entry of this order. If Plaintiff chooses not to file
4 an amended complaint curing the stated deficiencies, this action will proceed on
5 the Eighth Amendment failure to protect claim against Underwood, Cooke,
6 Bodenhamier, Esquivel, and Clay and the First Amendment retaliation claim
7 against Dzurenda, Underwood, Hernandez, Cooke, Gittere, Bodenhamier,
8 Esquivel, and Clay only.

9 **IV. CONCLUSION**

10 It is therefore ordered that a decision on the application to proceed *in forma*
11 *pauperis* (ECF No. 1) is deferred.

12 It is further ordered that the Clerk of the Court is directed to (1) file the
13 Complaint (ECF No. 1-1) and (2) send Plaintiff a courtesy copy of the Complaint.

14 It is further ordered that the Clerk of the Court is directed to add
15 Bodenhamier, Esquivel, and Clay as defendants to the docket sheet.

16 It is further ordered that the First Amendment retaliation claim will proceed
17 against Defendants Dzurenda, Underwood, Hernandez, Cooke, Gittere,
18 Bodenhamier, Esquivel, and Clay.

19 It is further ordered that the Eighth Amendment deliberate indifference
20 failure to protect claim will proceed against Defendants Underwood, Cooke,
21 Bodenhamier, Esquivel, and Clay.

22 It is further ordered that the Fourteenth Amendment procedural due
23 process claim is dismissed without prejudice and with leave to amend.

24 It is further ordered that the 28 U.S.C. § 1746 claim is dismissed with
25 prejudice as amendment would be futile.

26 It is further ordered that the state law claims under NRS 208.165, NRS
27 209.131, NRS 209.161, and NRS 209.181 are dismissed with prejudice as
28 amendment would be futile.

1 It is further ordered that any constitutional claims based on violations of
2 NDOC's administrative regulations are dismissed with prejudice as amendment
3 would be futile.

4 It is further ordered that Fourteenth Amendment due process claim related
5 to the administrative grievance process is dismissed with prejudice as
6 amendment would be futile.

7 It is further ordered that the Fourteenth Amendment due process claim
8 related to violations of state law is dismissed with prejudice as amendment would
9 be futile.

10 It is further ordered that if Plaintiff chooses to file an amended complaint
11 curing the deficiencies of his complaint, as outlined in this order, Plaintiff will file
12 the amended complaint within 30 days from the date of entry of this order.

13 It is further ordered that the Clerk of the Court will send to Plaintiff the
14 approved form for filing a § 1983 complaint and instructions for the same. If
15 Plaintiff chooses to file an amended complaint, he should use the approved form
16 and he will write the words "First Amended" above the words "Civil Rights
17 Complaint" in the caption.

18 It is further ordered that, if Plaintiff chooses to file an amended complaint,
19 the Court will screen the amended complaint in a separate screening order. The
20 screening process will take several months.

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1 It is further ordered that, if Plaintiff chooses not to file an amended
2 complaint curing the stated deficiencies of the complaint, this action will proceed
3 immediately on the Eighth Amendment failure to protect claim against
4 Underwood, Cooke, Bodenhamer, Esquivel, and Clay and the First Amendment
5 retaliation claim against Dzurenda, Underwood, Hernandez, Cooke, Gittere,
6 Bodenhamer, Esquivel, and Clay only.

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8 DATED THIS 20th day of December 2023.

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11 ANNE R. TRAUM
12 UNITED STATES DISTRICT JUDGE

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